BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

REPLY COMMENTS OF

HOME TELEPHONE COMPANY, INC.

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EXECUTIVE SUMMARY

In these reply comments Home presents its baker's dozen of the key concepts addressed in this proceeding. At its heart, this proceeding is about who will control the Internet. While for political purposes many have set up the debate as government versus business, it is really about big business versus the public. Several large corporate players now connect the clear majority of consumers to the Internet. These large ISPs also control an increasing volume of content or "edge services". These large ISPs continue to grow and consolidate both network infrastructure and content. Even today, these large national ISPs have the power to dictate terms and conditions to most other smaller network providers and all but the largest edge providers. The Commission has ample evidence in the record to show both how network control was exercised in the past and how it is being exercised today.

Against the many concerns documented in this filing, the Commission has but the single disputed argument, supported by those seeking self-benefit, that regulation is lowering investment in broadband infrastructure. In a normal environment, it is unlikely this debate would even be conducted. However, many have infused politics into this issue and it has become artificially intertwined with larger political concepts. Home believes it is critical that the Commission leave the politics to Congress. The Commission should simply deal with the facts. The Commission should ensure that its actions are directed to protect the consumer and the greater Internet ecosphere.

Specifically, Home asks the Commission to take note of the following points in its deliberations:

The Changed Internet Ecosphere

1. The Internet is key to both the economic and social life of our nation, it is a blend of the office water cooler and the town square—a place where communications are exchanged.
2. The role and nature of ISPs has changed over time. Every ISP must provide the transport element to its customers—it may or may not provide other services.
3. The big are getting bigger. Large ISPs control both national Internet transport routes and how smaller ISPs connect to the Internet.
4. Large ISPs are rapidly becoming major content owners, creating an even bigger incentive to control the network and drive customers to their own content.

The Needs of the Few versus the Needs of the Many

5. The Commission must carefully balance the rights and needs of the ISPs against the rights and needs of the public that depends on the "Internet" for its ability to communicate.

Consumers Know Best

6. What most people think of as the Internet is the information or content provided by edge-providers/end-users. This is where creativity explodes, this is where competition thrives.
7. Consumers expect their ISP to function as a common carrier. They are not paying the ISP to control/edit/curate the information the consumer requests or sends.

Networks and Investments

8. Transport networks are expensive to build and maintain. Networks form a natural bottleneck. There are few national network providers and relatively few ISPs. Most customers have access to less than a handful of potential BIAS providers at any one location.
9. The jury is still out with regard to the impact of Title II regulation on BIAS investment.
10. Interconnection is the heart of the Internet. If all networks' rights to interconnect are not protected, the Internet ceases to be the "inter" net or network-of-networks and becomes the monolithic network or "mono-net" of the privileged.

Politics and Law

11. The Courts Have Spoken—common carrier status and Title II regulations are required to ensure blocking and to enforce anti-discrimination rules.
12. BIAS regulation is not a partisan issue. While politics have intruded, they are being used as a tool by both sides to sway opinion and obscure facts.
13. The best solution is likely legislation and the Commission can assist with proposals. However, until legislation is adopted the Commission should retain its Title II classification of BIAS.

Home believes that in a time where all communications have converged to a single platform—the Internet—our leaders, both those elected and appointed, must stand with the people and protect our constitutional right to freely communicate. We simply cannot allow a few large powerful corporations to control the Internet. In the end, it is not a question of business versus the government, it is a question of the people versus big business.

As demonstrated in the record, the Commission has only one tool available that will enable it to protect the public interest. The Commission should use the tool, limited and narrowly tailored Title II regulations, as currently defined by law. Using this tool in the manner it was intended will allow Congress to act if our elected representatives feel that tool needs better refinement.

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REPLY COMMENTS OF HOME TELEPHONE COMPANY, INC.

INTRODUCTION

Home Telephone Company, Inc. ("Home" or "Home Telecom"), a South Carolina rural local exchange carrier ("RLEC"), hereby files these reply comments in response to the comments filed in the above referenced Federal Communications Commission ("FCC" or "Commission") Notice of Proposed Rulemaking proceeding.[1] As would be anticipated regarding an issue that has been contested for fifteen years, comments from the various parties generally aligned with their previous positions. The large Internet Service Providers ("ISPs"), the manufacturers that supply ISP equipment, the larger trade associations representing ISPs, and organizations favoring limited government supported the NPRM's proposal to eliminate the Commission's limited and tailored Title II regulations. On the other side, the edge providers, consumers, public interest groups, consumer groups, organizations favoring a larger role for government, and various state Attorneys General—duty-bound to enforce the law and promote the public interest—all opposed the NPRM's direction and supported retaining Title II regulations.

In the same vein, after a decade and a half of debate, Home observes that most of the positions taken by the various commenters have been placed on the record previously. In many ways, the

[1] Federal Communications Commission, *Notice of Proposed Rulemaking, In the Matter of Restoring Internet Freedom*, FCC 17-60, WC Docket 17-108, rel. May 23, 2017 ("NPRM").

only thing new in this proceeding is the composition of the Commission considering anew the record. Given this state of affairs, Home will reply to comments it believes best illustrate the key issues the Commission should consider and will address the few new or novel points that have been raised.

As mentioned in its initial comments, Home supports the view that the Internet is ultimately a consumer-oriented service and the needs of consumers should outweigh the desires of ISPs—both wireline and wireless. The key concepts Home identifies in its reply comments represent a baker's dozen of issues spanning five major areas of focus: the changed Internet ecosphere; the needs of the few versus the needs of the many; consumers know best; networks and investment; and politics and law.

Home is both an ISP and RLEC. Notwithstanding, it sees the marquee policy decision in this proceeding more from the perspective of the consumers—the ultimate users of Broadband Internet Access Service ("BIAS")—than from the perspective of a provider of such service. Home continues to recommend the Commission retain its current limited and tailored Title II regulations until Congress provides authorization to treat BIAS under a unique statutory classification crafted to address BIAS in the 21st century.

DISCUSSION

A. The Changed Internet Ecosphere

While the Commission spends much time and effort in the NPRM attempting to paint the prior Commission's 2015 Internet Order as being a deviation from historical precedent, Home believes

the historical precedent is irrelevant. The evidence strongly supports the conclusion that much has changed since the 2002 Commission order on cable modems.[2]

1) The Internet is key to both the economic and social life of our nation, it is a blend of the office water cooler and the town square—a place where communications are exchanged.

Home's initial comments focused on what it considered a common sense, consumer-focused approach. We believe it is important for the Commission to give weight to the fact that the "Internet" has become the one central hub for communications. In effect, all forms of communications now depend on the Internet. Everything, from voice, to print, and to video, relies on the Internet to reach its intended audience. Our society depends on the Internet for entertainment, news, economic wellbeing, health, and education. Many commenters recognized the central importance of the Internet in today's 21st century society.[3] The Internet is effectively displacing the traditional modes of delivery of almost every form of communication and has become the essential platform for communications. It would be harmful for the Commission to allow a few large entities to control what information is allowed to flow through this central and critical hub of communications.

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[2] *See Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling*; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) ("Cable Modem Order").

[3] *See e.g.*, Comments of AARP, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) ("AARP") at iv, Comments of National Consumer Law Center, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) at 3, Comments of Ad Hoc Telecom Users Committee, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) at i, Comments of WTA – Advocates for Rural Broadband, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) ("WTA") at 1, *See* Comments of State Attorneys General of the States of Illinois, California, Connecticut, Hawaii, Iowa, Maine, Maryland, Massachusetts, Mississippi, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 18, 2017) ("State Attorneys General") at 2.

2) The role and nature of ISPs has changed over time. Every ISP must provide the transport element to its customers—it may or may not provide other services.

In addition to the almost universal pervasiveness of the Internet, it is also important to understand that how citizens connect to the Internet has changed since the Commission first addressed the proper regulatory regime for the Internet in 2002. The "dial-up" connection to the Internet has given way to the "always-on" BIAS connection. AARP notes that in 2002, when the Commission considered cable modem regulations, over 80% of Internet connections were by traditional dial-up telephone lines connected to a third-party ISP such as America Online ("AOL").[4] AARP also notes that today's typical end user is also an edge or content provider.[5] Through applications like Facebook, YouTube, and hundreds of other products, end users provide content even while they consume content. The bottom line is that ISPs provide the critical transport network through which the public interconnects and communicates. ISPs are not simply another type of edge provider in the Internet ecosphere.

3) The big are getting bigger. Large ISPs control both national Internet transport routes and how smaller ISPs connect to the Internet.

As the Commission contemplates its potential change in BIAS regulation, Home submits that it must also consider how the market is changing. Consolidation is quickening and the largest ISPs continue to get bigger. Charter and Time Warner are only the most recent in a string of consolidations that leave ever fewer ISPs in operation. However, even more troubling is that in

[4] AARP at 80, footnote 234.

[5] AARP at 87 ("*The distinction between 'customer' and 'edge provider' has become more fluid.*").

2002 most consumers could reach the ISP of their choice. It is estimated that over 7,000 individual ISPs existed in 2002.[6] Today, the average consumer is limited only to a small handful of ISPs, and in general must choose between a few available wireless providers, a cable company, a telephone DSL connection provider, or a few satellite providers. ISPs have the technical ability to control what their customers can send or receive. As noted by INCOMPAS, the largest four ISPs provide 70% of U.S. residential connections.[7] Thus, the largest ISPs also effectively control what smaller ISPs can send or receive to the large ISP customer base. Even more concerning and personally evident to Home is that these large ISPs also effectively control the national transport backbone that smaller ISPs depend upon to connect to the Internet.

4) Large ISPs are rapidly becoming major content owners, creating an even bigger incentive to control the network and drive customers to their own content.

Various parties have noted the trend to create and promote ISP content in their filings.[8] The impact of a network transport owner controlling content is clear. The incentive and rewards associated with blocking and/or slowing competitive content have greatly increased. Verizon and Yahoo, Verizon and AOL, Comcast and NBC, AT&T and Direct TV, AT&T and Time Warner—the largest ISPs—are quickly becoming large edge providers. This fact provides these ISPs with an ever-increasing incentive to abuse their bottleneck positons as transport providers to

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[6] *The Alexander Saca Blog*; "The Neverending Story: ISP Market Consolidation", July 2017, accessed August 25, 2017, http://www.sacatech.com/blog-history-of-isps.php.

[7] Comments of INCOMPAS, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) at 29.

[8] *See* Comments of Amazon, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) at 5, Comments of NASUCA, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) at 10, Comments of Level 3, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) at 12, and Comments of Internet Association, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) ("Internet Association") at 23.

promote their content at the expense of others' content and require payment for content transported to other ISP networks. This change alone should cause the Commission alarm since, as pointed out by AARP, even as far back as 1983, the District Court in conjunction with the divestiture ruling raised the concern that operating companies could discriminate against competing information service providers.[9]

These four facts concerning the Internet ecosphere point to the conclusion that determinations made at the turn of the century are already hopelessly outdated. Even if the historical narrative painted by the NPRM regarding past regulation of the Internet were totally accurate, which many commenters have pointed out it is not,[10] that narrative is now totally outdated. The Commission must evaluate the regulatory status of the Internet given the four changes in the "Internet" ecosphere Home has highlighted above.

The question the Commission must now answer is: Who controls the "Internet"? While at the turn of the century the ISPs of the day had little ability to control the Internet, this fact has clearly changed. The Commission recognized this change in 2015 when it made the determination to classify BIAS a common carriage service and subject it to limited and tailored Title II regulations. Regardless of the political hype, the complexity, or the legal maneuvering, the real question is not whether the government should regulate the "Internet", but rather, do the ISPs have the right to control what flows over their transport network?

[9] AARP at 98, footnote 286.

[10] *See e.g.*, Comments of Common Cause, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) at 53-57, and Comments of NASUCA, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) ("NASUCA") at 15.

B. The Needs of the Few versus the Needs of the Many

5) The Commission must carefully balance the rights and needs of the ISPs against the rights and needs of the public that depends on the "Internet" for its ability to communicate.

This core issue—who should have the right to control the Internet—is perhaps no better defined than in the filing of Harold Furchtgott-Roth and the Washington Legal Foundation.[11] This filing is perhaps the most honest, straight-forward rendition of the outcome most opponents of Title II have in mind. It states:

> "By forcing broadband Internet service providers (ISPs) to carry, transmit, and deliver *all* Internet content—even that with which the provider disagrees—the Order impermissibly compels speech and deprives ISPs of their editorial discretion under the First Amendment."[12]

The filing goes on to say:

> "The Order imposes speaker- and content-based burdens that violate ISPs' First Amendment rights, both by compelling their speech when they would otherwise prefer not to speak and by restricting or otherwise burdening truthful and non-misleading commercial speech. Such restrictions are subject to heightened scrutiny—a burden FCC

[11] Comments of Harold Furchtgott-Roth and Washington Legal Foundation, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) ("Furchtgott-Roth and WLF").

[12] *Id.* at 1.

cannot meet. In any event, as explained below, the Order cannot withstand *any* level of First Amendment scrutiny."[13]

This filing strips away the unnecessary details and makes the case that the ISPs have an absolute "constitutional" right to control the speech over their networks. By default, this of course means those using the ISPs' transport networks have no right to speech on those networks. They can look for another ISP, if one is available, or perhaps build their own network if they want their voice to be heard.

This is the likely outcome if the Commission eliminates Title II regulations. The courts, as many commenters have shown, have made it abundantly clear that absent Title II regulation the Commission cannot impose "common carrier" obligations upon an ISP.[14] The courts understand what the Commission has for years attempted to deny. By definition, a "common carrier" is "any person engaged in rendering communications service for hire to the public".[15] If the

[13] *Id.* at 3-4. This argument that ISPs enjoy first amendment rights is derived from the belief that the transmission of speech cannot be separated from its content and quotes Marshall McLuhan's 50-plus-year-old observation that "the medium is the message".

[14] *See e.g.*, NASUCA at 5, and 11-12, Comments of American Association of Law Libraries, American Library Association, Chief Officers of State Library Agencies, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) ("Law Libraries") at 20-21, Comments of NARUC, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) ("NARUC") at 4, Comments of Level 3, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) ("Level 3") at 6, and Comments of Consumers Union, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) ("Consumers Union") at 11, and State Attorneys General at 13.

[15] 47 C.F.R. § 21.2 (1995). *See* National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976). NARUC 1, 525 F.2d at 641 (quoting Semon v. Royal Indem. Co., 279 F.2d 737, 739 (5th Cir. 1960)) ("what appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently...'"); *see also* Pitsch, Peter K. and Bresnahan, Arthur W. (1996) "Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative," *Federal Communications Law Journal*: Vol. 48: Iss. 3, Article 4.

Commission is not willing to recognize the fact that the ISP is a common carrier, then it cannot and should not attempt to require the ISP to act like a common carrier.

This in effect means, as Furchtgott-Roth argues, the ISP is the king of its network and free to rule as it desires. The customer has no right to expect that information they send or receive over the ISP's network will not be changed in form or content, or even delivered for that matter. The ISP alone has total control.

While most other opponents of Title II service will not go as far as Mr. Furchtgott-Roth suggests, the end result is the same. In effect, the ISP should have the right to block, discriminate or even refuse services because it owns the transport. Inmarsat, Inc. provides the more appropriate solution in their filing in which it states an ISP can hold itself out to consumers as offering an edited service rather than indiscriminate Internet access service.[16]

Such service would not allow for full access to all content, but only that which the ISP wishes to provide.[17] This of course is a different service than provided by most ISPs today and far different from what most consumers would desire.

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[16] Comments of INMARSAT, INC., *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) at 12.

[17] Such approach has been recognized recently by the U.S. Court of Appeals, District of Columbia Circuit. *See U.S. Telecom Ass'n v. FCC*, U.S. Court of Appeals, District of Columbia Circuit, No. 15-1063 (consolidated), May 1, 2017, 855 F.3d 381. ("*Our dissenting colleague separately argues that the First Amendment poses an independent bar to the FCC's [2015] Order. The Order, he submits, infringes the First Amendment rights of broadband ISPs. Specifically, he understands Supreme Court precedent to recognize a First Amendment entitlement on the part of an ISP to block its subscribers from accessing certain Internet content based on the ISP's own preferences, even if the ISP has held itself out as offering its customers an indiscriminate pathway to Internet content of their own—not the ISP's—choosing.*

Under that view, an ISP, for instance, could hold itself out to consumers as affording them neutral, indiscriminate access to all websites, but then, once they subscribe, materially degrade their ability to use Netflix for watching

Home suspects that the hundreds of millions who view the Internet as their constitutional right to free speech would likely take a different view. In fact, the Furchtgott-Roth and WLF filing brings to the fore a core question: Will this FCC protect the "rights" of the few—the limited number of BIAS providers, or the "rights" of the many—the hundreds of millions of users and edge providers who communicate through the Internet?

While others may attempt to hide behind politics, complexity, or any other cover, what this filing makes clear is that in the end, the Commission is left to determine if the few will be allowed to control the many. The Commission now has a complete record. It has the authority, bounded by the court's last determination, to rule the transport network a common carrier network, or not. What the Commission lacks the authority to do is to return to the game of the past where the Commission declined to hold the transport network as common carriage but pretended it could still regulate as if it were.

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video—or even prevent their access to Netflix altogether—in an effort to steer customers to the ISP's own competing video-streaming service. Alternatively, an ISP, again having held itself out as affording its customers an unfiltered conduit to Internet content, could block them from accessing (or significantly delay their ability to load) the Wall Street Journal's or the New York Times's website because of a disagreement with the views expressed on one or the other site.

An ISP has no First Amendment right to engage in those kinds of practices. No Supreme Court decision suggests otherwise….")

C. Consumers Know Best

It is telling that almost every consumer and public interest organization participating in this proceeding voiced grave concerns over the Commission's intent to de-regulate BIAS.[18]

6) What most people think of as the Internet is the information or content provided by edge-providers/end-users. This is where creativity explodes, this is where competition thrives.

No filings in this proceeding have changed Home's initial opinion that the key issue is the proper defining of the Internet. If the Internet is monolithic, or as Furchtgott-Roth quotes Marshall McLuhan, "the "medium is the message," then the average consumer loses. Control over our communications, indeed our right to communicate, will rest with a very few, large, powerful companies. Only those who can create their own medium will have a right to speech. Those who cannot afford to build their own "medium" can talk all day, but no one will hear.

If, on the other hand as identified by Home, the Internet can be separated as the consumer sees it into its three components—content, transport, and device[19]—it is logical to consider BIAS, or the transport element, as a common carriage service. Thus, we end as we began back in 2002. Is the Internet made up of separable component parts? If so, we must protect the competitive ends and not allow bottleneck transport owners to control them. In its initial comments, Home submitted

[18] *See e.g.*, Consumers Union at 5, and 11-12, NASUCA at 5,11-12, State Attorneys General at 11, Comments of Free Press, *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) ("Free Press") at 4, Law Libraries, at section IV, Level 3 at 6, footnote 20, and Internet Association at 6.

[19] Comments of Home Telephone Company, Inc., *Restoring Internet Freedom,* WC Docket No. 17-108 (July 17, 2017) ("Home's Initial Comments") at iv.

a white paper by a respected communications engineering firm that explained how transport was clearly separated from content.[20] In addition, other parties noted this technical separation as well.[21] While our Washington policy makers struggle with this "separation" concept, the average consumer knows the answer.

7) Consumers expect their ISP to function as a common carrier. They are not paying the ISP to control/edit/curate the information the consumer requests or sends.

Home agrees that consumers expect their ISP to function as a telecommunications service provider, not as an information service provider.[22] A telecommunications service provider is expected to transport traffic in a non-discriminatory manner without change in form or content of the traffic. The consumer does not want or expect the ISP to store, transform or process the information being sent over the Internet via BIAS. The consumer wants information delivered to the party the consumer directs it to and wants the reply returned from the requested party. Consumers are looking for their ISPs to provide BIAS to enable communications with the edge provider or another user of their choosing. A consumer may decide to use edge services provided by her ISP, but she certainly is not expecting her ISP to dictate the edge services available to her when subscribing to BIAS.

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[20] *Id.,* Attachment 2.

[21] *See e.g.*, Free Press at 45-49.

[22] See e.g., *Id*. at 49, Comments of National Law Center, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) at 8.

D. Networks and Investments

8) Transport networks are expensive to build and maintain. Networks form a natural bottleneck. There are few national network providers and relatively few ISPs. Most customers have access to less than a handful of potential BIAS providers at any one location.

With due respect to former-Commissioner Furchtgott-Roth, BIAS is not the modern-day equivalent of the printing press. In fact, it is more akin to the old-fashioned telephone. It is used by one party to connect to other parties for exchanging information.[23] Home questions whether citizens would have wanted the telephone company to block their calls because the phone company did not like the conversation or the parties attempting to communicate. We doubt they would have wanted the phone company to track their calls, redirect their calls, or degrade the quality of the call if the calling party didn't pay a fee. We are just as certain citizens will not stand for their ISPs acting in this way either.

These common carrier concepts are essential for the free flow of information. Our elected and appointed leaders have always understood the need for citizens to have the right to freely communicate between themselves without either the network provider or the government interfering. Our citizens need our leaders to protect us against network owners controlling or interfering with the flow of communications. The citizens ultimately have the ballot box in our democratic system to protect against the government's unreasonable interference in the public's communications or the government's failure to protect citizens from unreasonable interference

[23] WTA at iii and 13.

by network owners. Home believes our current elected officials understand this basic truth, and will protect the citizens they are elected to represent.

9) The jury is still out with regard to the impact of Title II regulation on BIAS investment.

Other than the previously mentioned argument that ISPs have a constitutional right to control speech on their network, the only other real argument for changing the classification of BIAS back to Title I has been related to investment. Home notes that almost every party making this argument does so from their own narrow self-interest either as an ISP, or as an entity that is a provider of services or equipment to an ISP.[24] Those that do not fall into this category fall into groups Home believes are simply making a misguided "political" statement.[25]

Many parties have disputed the claim that broadband infrastructure investment has declined.[26] At best, the experts cancel themselves out. In the business world, investments are made to generate a return for their owners. There are many factors that impact the expected return. While regulations impact returns, it is clear that major investments took place in a highly-regulated telephone industry and in the early days of BIAS deployment.[27] One reason

[24] *See e.g.*, Comments of Verizon, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) ("Verizon"), Comments of AT&T, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017), Comments of Comcast Corporation, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) ("Comcast"), Comments of Cisco Systems, Inc., *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) ("Cisco"), Comments of CenturyLink, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) ("CenturyLink").

[25] *See e.g.*, Comments of National Taxpayers Union, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) ("Taxpayers Union"), Comments of National Religious Broadcasters, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) ("Religious Broadcasters").

[26] *See e.g.*, AARP at Section V, Free Press at Section VI.

[27] *Id*.

investment might increase absent regulation is that investors would perceive they could make more profit with their network when they are in total control of consumers' communications. The ISP could profit not only from the network it builds, but the content it forces the consumer to take with the network. This is a model not dissimilar to traditional CATV providers. ISPs could raise rates and restrict access to non-affiliated content. The very idea that providers could increase returns through such practices should raise alarm with the Commission.

However, it is also likely, absent assurance of a fair and neutral regulatory regime, that investment in the larger part of the Internet ecosphere—content and devices—could decrease.[28] It would be harmful to the economy in general if the Commission's attempt to stimulate investment in infrastructure leads to reductions in investments in the much larger remaining parts of the Internet ecosystem.

Given the extremely high cost of transport construction, there is also another possibility: network owners could restrict bandwidth thereby forcing customers to the network's own lower bandwidth services, rather than spend the capital necessary to expand bandwidth. In fact, Microsoft notes in their filing that it is the demand for bandwidth from the edges that drives the need for more robust broadband transport.[29]

[28] Comments of Microsoft Corporation, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) ("Microsoft"), at 8, Comments of Amazon, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) at 2.

[29] Microsoft at 4-6.

Such concerns would be unfounded if BIAS were a fully competitive offering, but as many have noted, it is not.[30] In a competitive market, investment would be driven by competition as all parties would be operating under a common regulatory environment. Those that argue less regulation would increase investment are really saying there is not enough competition; thus, if you allow excess "rents", greed will encourage investment. This would seem to be far from an optimal plan to achieve ubiquitous broadband coverage across our nation and it would certainly not result in universal broadband deployment in high cost areas.

There is no way any credible party can draw a definitive determination of the impact on investment due to the 2015 re-regulation of BIAS. Too little time has lapsed and too many other factors are at play. For this Commission to risk the viability of the entire Internet economy on such a shaky foundation would be an abandonment of the public interest obligation the Commission is sworn to protect.

10) Interconnection is the heart of the Internet. If all networks' rights to interconnect are not protected, the Internet ceases to be the "inter" net or network-of-networks and becomes the monolithic network or "mono-net" of the privileged.

Home raised concerns about the impact on smaller ISPs' abilities to interconnect in our initial comments.[31] This is an issue that received far too little attention in the comments. This is understandable in that few have the history or experiences of the small rural local exchange carriers. For example, Home has operated as a traditional phone company since 1904, for over

[30] AARP at *v* and 73-77, Internet Association at 7.

[31] Home's Initial Comments at 18-19.

110 years. As a company, we have experienced and remember vividly our history when AT&T refused interconnection to our newly formed company. Our rural customers were not initially connected to the national network until 1914, a direct result of the 1913 Kingsbury Commitment. Several of the national trade organizations representing small rural carriers have noted interconnection in the broadband world for BIAS is just as important, if not more important, than it was a century ago.[32]

Noted in those filings is the fact that the largest ISPs also control where smaller providers must connect to exchange traffic and how much they must pay for transport and interconnection. The ability and the incentive exist for these large providers to create inefficient and unaffordable connection obligations. As WTA states, some smaller ISPs have already encountered difficulties.[33] As an example, Home has been unsuccessful in even getting one of the larger providers to discuss direct IP interconnection. Other providers have also noted difficulty obtaining acceptable interconnection with the largest ISPs. Level 3 devoted a substantial portion of its comments discussing their experience with larger ISPs who they say leveraged their gatekeeper power with other networks seeking to exchange traffic.[34] INCOMPAS notes that large ISPs have disadvantaged traffic exchange through the terms of interconnection agreements.[35]

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[32] *See* Comments of NTCA—The Rural Broadband Association, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) ("NTCA") at 5, WTA at 2.

[33] WTA at Section II.

[34] Comments of Level 3 Communications, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) at 2.

[35] Comments of INCOMPAS, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) at 21.

It should be clear from the record that an enforceable national interconnection policy for BIAS is required. Home is concerned that since the Commission admitted that it is unable to protect interconnection short of Title II regulation,[36] this important protection will be lost by moving to Title I. Thus, as the Commission examines all its options it should keep this fact in mind. The Commission and almost all filers agree that blocking and discrimination are inappropriate actions in the Internet ecosphere. If the Commission must choose between Title II with forbearance, a proven tool, or again return to the uncertainty of Title I, the interconnection issue should tip the scale in favor of staying with Title II with substantive forbearance as adopted in the 2015 Order. It is likely that the Commission will again find itself unable to exercise any influence over ISPs and be powerless to stop blocking or discriminatory actions under Title I. At best, more lengthy and costly court battles await. But even if the Commission were successful in curbing these actions, it has admitted it would lack any authority over interconnection. This would allow the large ISPs the ability to eliminate any of the smaller ISPs it desires or to demand excessive prices which would ultimately harm rural subscribers. The interconnection issue alone demands that the Commission retain its Title II authority pending a legislative effort that would allow the Commission to both protect interconnection rights and prevent blocking and discrimination absent Title II.

[36] NPRM at 42.

E. Politics and Law

11) The Courts Have Spoken—common carrier status and Title II regulations are required to ensure blocking and to enforce anti-discrimination rules.

As many commenters have noted, the courts have clearly spoken regarding the Commission's authority to regulate BIAS.[37] The record in this proceeding shows that the Commission cannot apply Title II type regulations, such as bans on blocking and discrimination, unless the service is considered common carriage. Yet it is instructive that almost every commenter supported these regulations providing for a free and open Internet—even those opposed to Title II regulation.[38]

What most of these commenters, those who support a "free and open Internet" but oppose Title II classification, fail to realize is that the only way in today's environment to maintain a free and open Internet is by requiring ISPs to adhere to limited and narrowly tailored common carriage obligations. Most parties agree that, absent Title II regulation, the FCC's ability to protect consumers from the ISPs turning the Internet into their private domain is greatly weakened or eliminated.[39] As noted above, the courts have been clear time and again that without Title II regulation, the ISP is free to block and discriminate. The owner of the network is granted full legal rights to control what flows over its network. That almost all commenters support a "free and open Internet" shows the power and universality of the intended goal of this proceeding. Those opposing Title II while advocating for a "free and open Internet" are either misled or are

[37] *See e.g.*, Consumers Union at 5, and 11-12, NASUCA at 5,11-12, State Attorneys General at 11, Free Press at 4. Law Libraries at section IV, Level 3 at 6, footnote 20, and Internet Association at 6.

[38] Taxpayers Union at 2, Religious Broadcasters at 1, Comcast at 2, AT&T at 1, Verizon at 5.

[39] NASUCA at 11-12, Law Libraries at 20-21, NARUC at 4, Level 3 at 6, Consumers Union at 11.

intentionally attempting to mislead others. Title II regulation is far from allowing the government to control the Internet, rather, it is ensuring the large ISPs do not.

Many commenters who opposed Title II supported some form of "light touch regulations."[40] As indicated above, current law creates a somewhat binary option. The Commission can apply Title II regulation and forbear from unnecessary regulations—in effect, a light touch form of regulation—or instead the Commission can declare the ISP service a Title I service. However, as noted previously, if Title I is mandated the Commission will be unable to sustain most of the light touch regulation the commenters seem to desire and would not be able to protect smaller ISPs from possible abuse with their interconnection to larger ISP networks.

Finally, many commenters yearn to restore the regulation of yesteryear.[41] What these parties either intentionally or inadvertently overlook is that the prior "light touch" regulatory regime was prohibited by the courts **because** BIAS was classified as Title I. Thus, those arguing to return to the past call for an impossibility. The only way to retain a "light touch" regulatory process is Title II with forbearance—which is what we have today.

12) BIAS regulation is not a partisan issue. While politics have intruded, they are being used as a tool by both sides to sway opinion and obscure facts.

Home is concerned that an issue as critical as national broadband policy has become something of a partisan political football. Home realizes that the political nature of this debate is a sensitive

[40] CenturyLink at 14.

[41] Comments of USTelecom Association, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017) at 4, Cisco at 5.

arena and, like the proverbial elephant in the room, it is something that most have chosen to avoid. Yet all know, even the Commission, that political considerations are one of the main drivers of this proceeding.

Politics has somehow become intertwined with the question of how BIAS should be regulated. It has almost become a litmus test on where you stand on the political debate between those favoring a larger or smaller government. The debate about BIAS protections should not be impacted by politics, rather, it should turn on the correct level of regulations based on current law. Almost all parties agree that certain key concepts are critical to a free and open Internet. For example, almost all agree that blocking and discriminating are harmful. The courts have made it clear that the Commission has the authority to regulate this activity if BIAS is offered by a common carrier under Title II. By the same token, the courts have been equally clear that absent the requirement of Title II common carriage, under current law, the Commission has very limited authority to regulate blocking or discrimination.

Thus, Title II is simply the tool the Commission has under current law to prohibit blocking and discrimination. Title II regulation however, has been made analogous with larger government by those opposed to regulating ISPs. Just as egregious, those favoring larger government seize on Title II as symbol of their political belief. The critical issues of BIAS policy that will determine our nation's economic health and our nation's standing in the world marketplace have been reduced to simple political slogans: "government expansion and control" versus "reduce government and regulations." Both politicians and large corporate players have created an environment where reasonable discussion and debate is difficult.

It has not always been this way for national telecommunications policy. Telecom policy has traditionally been a bi-partisan effort. An efficient, well-functioning communications system is key to our social, political and economic well-being: it transcends politics. The Commission has a tool kit from which it can select various tools to accomplish its obligations as a regulatory body. The tools are not by their inherent nature political. They have been granted by Congress to allow the Commission to function. To choose to deploy or not deploy a specific tool due to the political connotations that others might associate with it would be dereliction of the duty entrusted to an independent regulatory body.

The politicization of this issue is amazing when you consider that less than 15 years ago, Justices of opposing political views, Justice Scalia and Justice Ginsburg, could come together with Justice Souter to write a strong, lengthy dissent to the majority in *Brand X*.[42] The Court majority decided the case based on the concepts of Chevron and not on the specifics of the case. However, three Justices felt the Commission factually erred in the case, and thus Chevron did not apply. It is worthwhile to read again the introduction to Justice Scalia's dissent:

> "The Federal Communications Commission (FCC or Commission) has once again attempted to concoct "a whole new regime of regulation (or free-market competition)" under the guise of statutory construction. *MCI Telecommunications Corp, v. American Telephone &Telegraph Co*., U.S. 218,234 (1994). Actually, in these cases, it might be more accurate to say the Commission has attempted to establish a whole new regime of

[42] National Cable & Telecommunications Ass'n et al. v. Brand X Internet Services, 545 U.S. 967 (2005) ("*Brand X*").

> non-regulation, which will make for more or less free-market competition, depending upon whose experts are believed. The important fact, however, is that the Commission has chosen to achieve this through an implausible reading of the statute, and has thus exceeded the authority given it by Congress."[43]

Justice Scalia makes a strong case that those who support less government should also support limited authority of a regulatory body. The regulatory body is not free to create new regulations out of thin air and, just as important, is not free to refuse to regulate what has been mandated. But what is important is not the finding of these Justices, but rather the fact that they arrived at their position coming from different political philosophies. Their decision rested not on political rhetoric or from force of political pressure, but from a bi-partisan desire to simply reach the right conclusion.

Home urges the Commission to leave the politics to the politicians. It asks the Commission to act as an independent body, not in reaction to what other political leaders have said or done, and not simply to reverse a previous Commission's finding because of the politics. This Commission needs to look beyond the politics, closely examine the record, and reach a decision that protects America's consumers and our nation's role as the center of creativity and innovation.

[43] *Id.*, (Scalia, J. dissenting) ("Scalia Dissent").

13) The best solution is likely legislation and the Commission can assist with proposals. However, until legislation is adopted the Commission should retain its Title II classification of BIAS.

Other parties have addressed the possibility of legislative action.[44] Home believes that the best solution is a legislative one. It is time for Congress to pass laws specific to this century's communications system. A regulatory body that chooses to ignore applicable law or fails to protect citizens is no less progressive than one that finds new and inventive ways to over-regulate—a fact noted by one of the most brilliant, conservative legal minds in our lifetime.[45]

While Home certainly would not suggest that every possible regulation available should apply to Title II BIAS, the current light-touch regulation applied under Title II, what we have called "Title 1.5", is appropriate. We understand the concerns of some that the FCC could overreach in its regulatory zeal. This reason is why we firmly believe specific legislation is the answer. Congress should not abandon its legislative responsibility for such a critical issue. Under our Constitution, the regulator should be acting within the confines of appropriate legislative construct.

CONCLUSION

Home believes that we live in a time where all communications have converged to a single platform—the Internet. This single platform offers tremendous opportunities, but also creates a serious vulnerability that could allow a few large players to capture control over critical

[44] *See e.g.*, Level 3 at 14, NTCA at 9.

[45] Scalia Dissent.

communication hubs. Our leaders, both those elected and appointed, must stand with the people and protect the Internet to ensure our nation's citizens' constitutional right to freely communicate is not compromised. We simply cannot allow large powerful corporations to control the Internet. In the end, it is not a question of business versus the government. It is a question of the people versus big business.

As demonstrated in the record, the Commission has only one tool available that will clearly enable it to protect the public interest. The Commission should continue to use Title II regulations, as currently defined by law, and allow Congress to act if our elected representatives feel that tool needs refinement.[46]

In concluding, it seems appropriate to excerpt the preamble of the Communications Act with the emphasis added by the American Association of Law Libraries, American Library Association, Chief Officers of State Library Agencies:

> "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible**, to all the people of the United States without discrimination** on the basis of race, color, religion, national origin, or sex, a rapid efficient, Nation-wide, and world-wide wire and radio communication service with **adequate facilities** at **reasonable charges**, for the purpose of the **national defense**, for the purpose of **promoting safety of life and property** through the use of wire and radio communication, and for the purpose of securing a more effective

[46] Chair Marsha Blackburn of the House Telecom Subcommittee is reported to have said after her visit to Silicon Valley technology companies that "many of the companies are ready for us [Congress] to do something legislatively and put an end to the ping-ponging back and forth." Zhou, Li, "What's next on net neutrality", *POLITICO*, Aug. 25, 2017.

> execution of this policy by **centralizing authority** heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act."[47]

Given, as WTA has asserted, that the broadband network is now the nation's telecommunications network,[48] if the Commission will simply carry out its mandate and ensure the American people have access to a nondiscriminatory broadband network, the public will be served.

Ultimately, the Commission can find documentation from the experts and various large companies to support any position the Commission wishes to adopt. That's what these experts are paid to do—provide a viable rationale for the policy they support. The Commission can simply choose to accept comments from those that support the finding this Commission wishes to make and ignore the rest. This is the way Washington appears to work in many instances. This Commission should resist this urge and focus on the right BIAS policy for our time. This Commission will soon make a momentous decision. It could choose to do something exceptional. It could decide to ignore the conflicting experts and simply listen to the public. It could refuse to take the politically expedient action and instead do what is best for the American economy and the American consumer. This Commission could allow consumer-oriented common sense to drive its determination. This Commission could champion a truly free and

[47] Law Libraries at 19-20 (Emphasis in original).

[48] WTA at iii and 13.

open Internet—an Internet where regardless of the network the consumer might have available, the consumer would be assured of access to any lawful content over any standard device without fear of the network blocking or discriminating against the edge providers the consumer wishes to use. As we say here in South Carolina, ***Dum spiro spero***.

Respectfully submitted,

August 30, 2017

Home Telephone Company, Inc.

/s/ H. Keith Oliver
H. Keith Oliver
Senior Vice President, Corporate Operations
Home Telephone Company, Inc.
579 Stoney Landing Road
Moncks Corner, South Carolina 29461